No. 75-584

In the Supreme Court of the United States

OCTOBER TERM, 1975

FEDERAL POWER COMMISSION,
Petitioner

v.

TRANSCONTINENTAL GAS PIPE LINE CORPORATION, ET AL.,
Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR STATE OF NORTH CAROLINA AND NORTH CAROLINA UTILITIES COMMISSION IN OPPOSITION

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The State of North Carolina and the North Carolina Utilities Commission, petitioners in the court of appeals [1] and respondents here, oppose the Federal Power Commission's petition for a writ of certiorari to review an interlocutory order entered August 1, 1975 by the United States Court of Appeals for the District of Columbia Circuit in D.C. Cir. No. 74-2036 *et al.*; in that order, the court of appeals ruled that it would hold in abey-

[1] The other petitioners in the court of appeals were Transcontinental Gas Pipe Line Corporation, a natural gas company regulated by the FPC, and five of Transcontinental's customers.

ance its decision on the merits of the appeal before it—challenging a Federal Power Commission order which had set aside a compensation provision in a proposed pipeline curtailment plan—pending a Commission investigation of the extent and causes of the gas shortage on that pipeline which had necessitated a curtailment plan.

JURISDICTION

The order of the court of appeals was entered on August 1, 1975 and the court's orders denying rehearing and rehearing en banc were entered August 28, 1975. Because the order of the court below is interlocutory, the petitioner has not invoked jurisdiction under Section 19(b) of the Natural Gas Act, 15 U.S.C. § 717r (b), but relies solely on 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether, in reviewing the Federal Power Commission's rejection of a compensation provision contained in a proposed plan of curtailment in time of shortage on a pipeline system, a court of appeals may properly request the Commission to supplement the record to provide information as to the extent of and reasons for the shortage on that pipeline's system.

STATEMENT OF THE CASE

Introduction—The interlocutory order of the court below that is the subject of the Federal Power Commission's petition for a writ of certiorari was entered in a presently pending appeal from the FPC's November 12, 1974 order (Petition, App. E, pp. 16A-43A; rehearing denied Jan. 10, 1975, Petition, App. F, pp. 44A-65A) rejecting a compensation provision in a settlement agreement providing for an interim curtailment plan

for Transcontinental Gas Pipe Line Corporation for the period November 16, 1974 through November 15, 1975. The court below had previously passed upon the FPC's rejection of an earlier Transco proposal for the November 1973-74 period, see *Consolidated Edison Co.* v. *F.P.C.*, 511 F.2d 372 (Nov. 26, 1974); 512 F.2d 1332 (May 19, 1975); and 518 F.2d 448 (July 25, 1975), thereby resolving the allocation of supply on the Transco system for the period November 1973 through November 1975, and leaving in the current appeal below only the question of whether customers curtailed more deeply than system average should, in effect, be compensated by customers curtailed less deeply than system average.

Significantly for present purposes, although Transco is among the most, if not in fact the most, severely curtailed of all natural gas pipelines in the nation,[2] the Commission has never made any findings as to the causes or real extent of the extraordinary shortage on the Transco system. Nor, for that matter, although an extensive evidentiary record on the issue was compiled during the first half of 1974, has the Commission ever determined a just and reasonable curtailment plan, based on the evidentiary record, for the Transco system. In consequence, curtailments on the Transco system have been arrived at through negotiations—each covering one year at a time—between Transco and its customers.

At the outset, it may be noted that Transcontinental Gas Pipe Line Corporation is one of the country's major natural gas pipeline systems. Initially certificated in 1948, 7 FPC 24, see also 9 FPC 32, the Transco line, which extends from the lower Texas Gulf Coast to New York City, serves four major market areas: New York City and suburbs, New Jersey, Philadelphia and

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[2] See, e.g., Statement of Richard L. Dunham, FPC Chairman, before House Commerce Subcommittee on Energy and Power, Nov. 11, 1975, mimeo. p. 6.

suburbs, and North Carolina. Of these four markets, all but North Carolina have alternate pipeline suppliers. Transco's major customers purchase their gas pursuant to firm contracts with Transco, duly certificated by the Federal Power Commission; prior to the onset of shortages on the Transco system, the customers, almost without exception, purchased their full contract entitlement every day throughout the year. Beginning in 1971, however, Transco advised that its supply was inadequate to meet its contract entitlements, and that supply has deteriorated steadily since then. For the forthcoming 12 months, Transco estimates that it has a supply equivalent to only 55% of its customers' contract entitlements.

The Prior Proceedings—For both the 1971-72 and 1972-73 periods, Transco and its customers agreed to a curtailment plan under which each customer's contract entitlement would be curtailed in proportion to Transco's systemwide shortage, but an exemption to assure service to high priority markets could be invoked, with the customer invoking the exemption providing compensation to the customers furnishing the exemption gas. In November 1971 (46 FPC 1212) and again in November 1972 (48 FPC 1060) the FPC approved these agreed-upon plans. When Transco proposed continuation of the plan for 1973-74, however, the Commission—which in January 1973 had adopted general policy guidelines in FPC Order No. 467, 49 FPC 85, as amended, 49 FPC 583 [3]—ruled that Transco could not continue the prior curtailment plan but must instead file an Order 467-type plan. Transco made such a filing, under protest,

[3] On appeal, the Order No. 467 guidelines were held not to constitute a substantive rule or to shift the burden of proof, but merely to be a general policy which the Commission hoped to establish on the basis of the record to be made in subsequent proceedings, *Pacific Gas & Electric Co.* v. *F.P.C.*, 164 U.S. App. D.C. 371, 506 F.2d 33 at 38-39, 41, 43 (1974).

and the Commission directed that the plan be placed in effect pending the outcome of hearings on its propriety, see 49 FPC 1141, 50 FPC 281, and 50 FPC 803. North Carolina and others, citing the drastic effect that a 467-type plan would have, sought a stay from the Commission pending appeal, and when that was denied, 50 FPC 1485, filed a petition for review and request for stay with the court below.

Thereafter, during early and mid-1974, action continued on three levels. First, the parties briefed the appeal from the FPC's 1973 orders, which had, pursuant to the parties' request, been stayed pending review. Second, hearings were held and concluded before an FPC Administrative Law Judge on the propriety of a 467-type plan and alternatives thereto. Third, since it appeared unlikely that the Commission would reach a decision by November 1974 on the record just made, the parties undertook settlement negotiations to arrive at an interim plan for the November 1974-November 1975 period, and on September 30, 1974 submitted to the Commission a proposed settlement that was supported by Transco, by all government intervenors, including the Commission Staff, and by all but one of Transco's customers. That settlement was based in part on an Order 467 approach and in part on the prior proportionate approach, and included an amended provision for compensation.

On November 12, 1974—four days before the settlement was to take effect—the Commission entered an order (Petition, App. E, pp. 16A-43A) rejecting the settlement and once against directing Transco to file a straight Order 467-type plan to become effective November 16, 1974. The order focused most of its criticism not on the proposed allocation of gas but, surprisingly, on the compensation provision, which, with one Commissioner dis-

senting, it held was unlawful.[4] Thereafter, on January 10, 1975, following the intervening court of appeals decision in *Consolidated Edison Co.* v. *F.P.C.*, 511 F.2d 372, the Commission denied rehearing of its November 12 order (Pet. App. F, pp. 44A-65A); again, with one Commissioner dissenting, the Commission ruled the compensation provision unlawful.

The Present Proceedings—Separate petitions to review the Commission's November 12 and January 10 orders were filed by Transco, five of its customers, and North Carolina, and the several appeals were consolidated and placed on an expedited schedule. On May 28, 1975—one week after hearing oral argument—the court of appeals, noting that the stated predicate for the Commission's order under review was the acute and increasing gas shortage on the Transco system, requested the parties to submit historical and current natural gas reserve figures for Transco (Pet. App. C 11A-13A). Responses were submitted by both the FPC and Transco; in its response, however, the Commission expressly stated that it could not certify the accuracy of the figures it was submitting. Reacting to this apparent lack of certainty, the court, on June 7, 1975, directed the parties to show cause why a decision on the merits of the appeal should not be deferred pending an investigation by the Commission of Transco's reserves and a report to the court of the results (Pet. App. D 14A-15A); and on August 1, 1975, following the filing of responses to the show cause order, the court entered the order challenged here (Pet. App. A 1A-2A). The August 1 order, which essentially followed the form set forth in the June 7 order to show cause, required the Commission to complete its report to the court within thirty days, and was accompanied by a memorandum detailing the reasons for the court's concern that it be given accurate data on the extent and causes of the extreme shortage on the Transco system (Pet. App. A 2A-7A). A separate statement was also filed by Judge MacKinnon, who, while agreeing with his colleagues that the information sought was relevant to the court's determination on the merits, would have been willing to reach the merits without the requested data (Pet. App. A. 7A-8A).

[4] Prior to that point, the Commission had consistently approved compensation provisions both on the Transco system and on other pipelines.

In the meantime, the Commission had, on July 1, 1975—one month *prior* to the court's order here challenged—directed that a limited investigation of the Transco supply situation (originally initiated in January 1975) be expanded "to determine the extent of the alleged necessity for *any* curtailment on the system of Transco"; as part of that order, the Commission expressly directed its Staff "to conduct a full and complete investigation . . . as expeditiously as circumstances permit" (emphasis supplied). On August 8, 1975, following the court's order, the Commission entered two further orders in its pending investigation of Transco's supplies: the first (Pet. App. G 66A-68A) directed Transco to produce all company records relating to gas supply at the Commission's offices by August 15, 1975; the second directed nineteen large producers (accounting for over 80% of Transco's supply) to furnish specified data relating to their sales to Transco by August 28, 1975.

Notwithstanding its issuance of the intervening orders, the Commission petitioned the court below for rehearing and rehearing en banc. Rehearing was denied on August 28, 1975, and the Commission's petition for a writ of certiorari followed. Pursuant to orders of this Court, operation of the court of appeals' August 1 order has been stayed pending disposition of the petition for certiorari.

REASONS FOR DENYING THE WRIT

Before proceeding to an analysis of the three reasons urged by the Commission as warranting grant of a writ of certiorari (Petition 11-18), it is important to note that, even were there assumed to be some substantive merit to the Commission's contentions, those contentions are not squarely presented by this case, and hence cannot justify grant of certiorari here. What the Commission is challenging by its present petition is an interlocutory order of the court of appeals issued August 1, 1975, which directed the Commission to conduct a field examination of Transco's supplies and report the results to the court within thirty days. But as the Government's petition reveals (Petition 16 n. 10), the Commission itself had, on July 1, 1975—a full month *before* the order of the court below—initiated a full investigation into the very matter that was the subject of the court's August 1 order. Hence, unless the Commission is now asserting that its July 1 order was never intended to be implemented but was designed merely to deceive the parties and the court, the present petition presents no issue whether a court may direct an agency to undertake an investigation against its will but only whether a court may defer decision of a pending appeal until the agency completes an investigation that it has already initiated and that it has directed be processed "as expeditiously as circumstances permit" (FPC order of July 1, 1975, quoted *supra* p. 7).

The only possible remaining issue—whether the thirty-day period allowed by the court below for submission of the requested data was adequate—has already been mooted by the passage of time. To begin with, of course, the "thirty-day" requirement set forth in the court's August 1 order effectively allowed the Commission sixty days from the Commission's own July 1 initiation of its

investigation. More importantly, as the result of the stays obtained by the Commission in connection with its pending petition for certiorari, the "thirty days" allowed by the order sought to be reviewed have already been extended to in excess of five months, and by the time the Court acts on the petition, a period of some six or seven months from July 1, 1975 will have elapsed. Nowhere in its pleadings in the court of appeals or here has the Commission suggested that six months is inadequate to complete its investigation.

Turning now to the specific arguments set forth by the petition, the Commission contends, first, that a court of appeals lacks jurisdiction to require, prior to decision of a pending appeal, the submission of supplementary data, no matter how relevant and material (Petition 11-14); second, that, in any event, the data here requested were not relevant and material (Petition 14-17); and, third, that immediate review by this Court is necessary to prevent "the diversion of substantial resources presently allocated to other Commission projects" (Petition 17-18).

The Commission's first contention is totally inconsistent with the express language of Section 19(b) of the Natural Gas Act (15 U.S.C. § 717r(b)) which specifically empowers a court of appeals, in a review proceeding, to "order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and *upon such terms and conditions as to the court may seem proper*" (emphasis supplied). And while the statute contemplated that the request to submit additional data would normally come from a party to the appeal, there is no basis for interpreting this specific grant of authority as depriving the reviewing court of the power, where the interests of justice so require, to achieve the same result *sua sponte*, cf. the All Writs Provision, 28 U.S.C. § 1651. Moreover, if a

request by a party were deemed a jurisdictional prerequisite, such a request is in fact reflected in North Carolina's response filed with the court below on August 27, 1975.

There is, in any event, an even more important reason for rejecting the Commission's narrow view of the powers of a court of appeals exercising its review function pursuant to Section 19(b) of the Natural Gas Act: that narrow view has been definitively and unanimously rejected, at the urging of the Commission, by this Court in *Mobil Oil Corp.* v. *F.P.C.*, 417 U.S. 283 at 311-12 (1974), where the Court held:

> "This jurisdiction to review the orders of the Commission is vested in a court with equity powers, *Natural Gas Pipeline Co.* v. *FPC*, 128 F.2d 481 (CA 7 1942), see *Ford Motor Co.* v. *NLRB*, 305 U.S. 364, 373 (1939), and we cannot say that the Court improperly exercised those powers in the circumstances. *Dolcin Corp.* v. *FTC*, 94 U.S. App. D.C. 247, 255-258, 219 F.2d 742, 750-752 (1954). Indeed, § 19(b) provides that the Court of Appeals may authorize the Commission in proper cases to take new evidence, upon which the Commission may modify its findings of fact and make recommendations concerning the disposition of its original order." (Footnote omitted.)

The Commission's second contention—that the data requested are, as a matter of law, immaterial to any possible issue involved in the court's deliberations—is, if not untenable on its face, simply not the type of issue warranting intervention by this Court. Clearly the Commission thinks the requested information is material to its consideration of shortages and curtailments on the Transco system—it instituted an investigation into "the alleged necessity for any curtailment on the system of Transco" on July 1, 1975. And while it is true that the appeal below involves only the validity of a compensation provision in a curtailment plan, it is difficult to fault the court of appeals' conclusion that information as to the causes of the shortage could bear importantly on the issue of who should provide compensation to customers suffering the most extreme curtailment. Of course, one major difficulty with proceeding on an interlocutory basis, as the Commission urges, is that it forces this Court to speculate as to the potential use by the court below of data which the Commission has thus far refused to provide.

The Commission's contention that the thirty-day deadline is unreasonable (Petition 17) has, as already noted, been mooted by the passage of time. Even had it not been mooted, however, the claim is flawed by the Commission's consistent failure to advise either the court of appeals or this Court (1) precisely how long the requested investigation would take or (2) assuming that a full investigation could not be completed within the specified period, what data could be made available in 30 or 60 days.

Finally, the Commission's claim that the court of appeals' order would "require the diversion of substantial resources presently allocated to other Commission projects" is both fatally unspecific and logically defective. Thus, the Commission has failed to aver what "other Commission projects", if any, will be impaired if the requested study is completed, and it has failed to allege that these unspecified "other projects" are as important to the administration of the Natural Gas Act as an evaluation of the supply on the Transco system, which is perhaps the most severely curtailed pipeline in the country. More importantly, since the Commission itself had, by its July 1, 1975 order, initiated and requested expedition of an investigation almost identical to that contemplated by the court of appeals' order, there is no way that the court's order could "divert" Commission

resources, since those resources are, if the Commission's July 1 order is accepted at face value, already devoted to the project at hand. In any event, the fact that a court order may require the allocation of Commission resources—as, for example, is normal where a Commission order is vacated and the case remanded for further evidentiary hearings—provides no basis for holding the court's action to be erroneous.

CONCLUSION

The interlocutory order of the court of appeals presents no issue warranting intervention by this Court. Accordingly, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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